



VETS HELPING VETS SINCE 1974

## **TURNED AWAY AT THE DOOR:**

### **SUICIDE CARE WITHHELD FROM AT-RISK VETERANS DUE TO MISCONDUCT IN SERVICE**

#### **HOUSE VETERANS' AFFAIRS COMMITTEE**

Health Subcommittee

Legislative Hearing on H.R. 4720, H.R. 4887, H.R. 4977, H.R. 5059, H.R. 5475, H.R. 5484

November 19, 2014

#### **Executive Summary**

Suicide is often the culmination of increasingly dangerous and dysfunctional behavior. When servicemembers start experiencing mental health stress on active duty, military commands often misunderstand their behavior change as misconduct and discharge them. The VA has authority to deny access to its services for veterans discharged for misconduct, and it does so in the large majority of cases. This creates a pipeline of suicide risk that starts with in-service mental health trauma and culminates with veterans who are at risk of suicide and denied access to VA support.

The Committee should direct the VA to extend eligibility to two categories of veterans at high risk of suicide, even when there was some misconduct in service: those that have deployed to a combat theater and those with service-connected mental health conditions. The Committee should also direct the VA to provide tentative eligibility for health care and homeless housing services while making its eligibility decision.

## I. Introduction

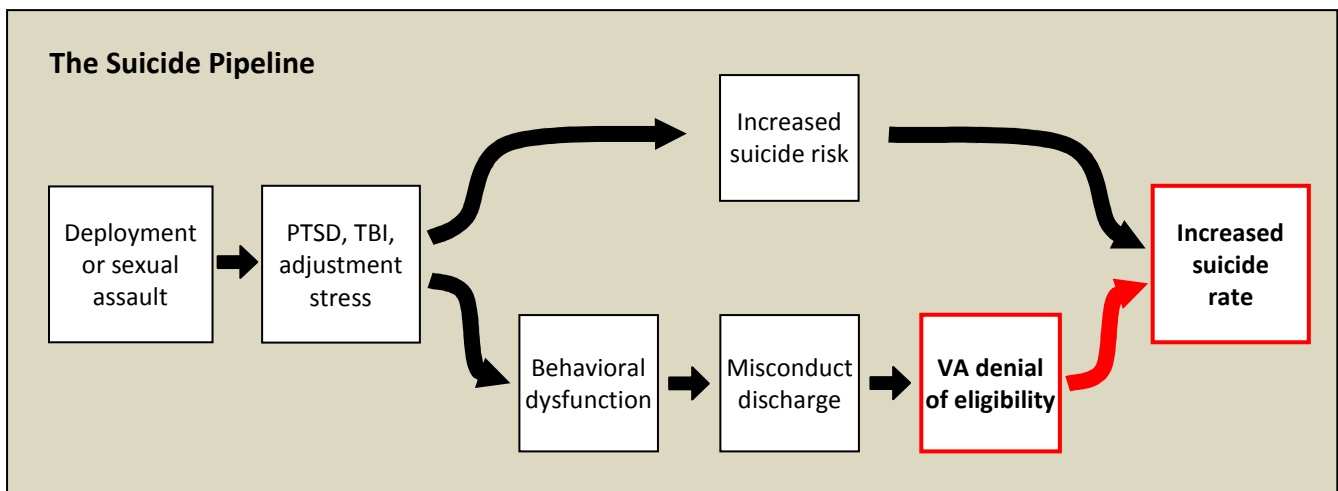
The rate of suicide for veterans outside of VA care is increasing.<sup>1</sup> In 2010, veterans outside of VA care were committing suicide 30% more frequently than those enrolled in VA care.<sup>2</sup> For the most high-risk cohort, men under age 30, the suicide rate for those outside VA care is nearly double the rate for those under VA care.<sup>3</sup> Excluding a servicemember from the VA increases the chance that this servicemember will commit suicide. One way that the VA excludes servicemembers at elevated risk of suicide is by denying “veteran” status to many servicemembers discharged for misconduct.

This testimony describes why servicemembers at risk of suicide are more likely to get misconduct discharges, how the VA denies and delays services to these servicemembers, and how Congress can make a targeted change to VA statute to prevent unnecessary veteran suicide.

## II. Servicemembers at risk of suicide are more likely to receive misconduct discharges

Certain mental health conditions are known to increase suicide risk. PTSD in veterans is associated with elevated suicide risk both for those with PTSD diagnoses<sup>4</sup> and those with PTSD symptoms that fall below the threshold for a PTSD diagnosis.<sup>5</sup> Veterans with TBI are 55% more likely to die by suicide.<sup>6</sup> Service members with prior deployments are more likely to attempt suicide, even when compared against other service members with similar mental health profiles.<sup>7,8</sup> Other predictors of suicide risk also involve behavioral dysfunction, such as Major Depressive Disorder, Substance Abuse, and Intermittent Explosive Disorder.<sup>9, 10</sup>

The military Services should be prioritizing these servicemembers for treatment and medical discharge. Often, they do not.



*How mental health disabilities acquired in service lead to misconduct discharges*

PTSD, TBI, and Major Depression produce behavioral dysfunction through an exaggerated startle response, inability to control reflexive behavior, irritability, or attraction to high-risk behavior.<sup>11</sup> Some of the medicines used to treat the conditions may induce fatigue or lethargy that also interferes with basic functioning. In fact, interference with social and occupational functioning is a primary measure of the severity of these conditions.<sup>12</sup> For servicemembers on active duty, these behavioral disorders may result in infractions of unit discipline. The Army reports that 25% of servicemembers who attempt or commit suicide while on active duty had prior misconduct infractions.<sup>13</sup>

Military Services often do not treat these disciplinary infractions as symptoms of mental health risk. The servicemember may not yet be diagnosed, or the command may not believe that the conduct is due to in-service trauma. Recent press reports provide many examples of servicemembers with early mental health trauma where their behavior in service was managed as a discipline problem rather than a mental health problem.<sup>14</sup> Even if the military service has already acknowledged a disability and is in the process of giving a medical discharge, the military Services may suspend the medical separation process and give an immediate misconduct discharge if any misconduct occurs and the servicemember volunteers to be separated rather than be court-martialed.<sup>15</sup>

In some cases, it is official policy to give misconduct discharges to servicemembers at risk of suicide. According to a 2010 Army report on active-duty suicide, one of its strategies for deterring suicidal behavior is aggressively separating servicemembers who exhibit high-risk behaviors.<sup>16</sup> A 2012 Army study found that the commander of Warrior Transition Units at Ft. Bliss showed a “primary attitude” that was “punitive, like a correctional facility.”<sup>17</sup>

The result is that servicemembers with mental health risks are more likely to get misconduct discharges. Marines with PTSD from combat exposure are 11 times as likely to be separated with a misconduct discharge.<sup>18</sup> Service members “at mental health risk” are 32% more likely to be separated from service within a year of deployment than service members not “at mental health risk.”<sup>19</sup>

**Kash Alvaro**

He deployed to Afghanistan and acquired PTSD and TBI so severe that it triggers seizures and heart palpitations. He was given an OTH discharge while waiting for a medical separation. His unit did not provide transportation to his medical appointments, reported that his seizures were faked, and did not approve his request to be assigned to a Warrior Transition Unit. He was discharged after he had isolated himself in his apartment for two weeks.  
**Granted VA care only after media attention.**

Source: Colorado Springs Gazette, “Other Than Honorable”, [csgazette.biz/soldiers/](http://csgazette.biz/soldiers/)

### **III. The VA denies and delays care to former servicemembers with misconduct discharges**

The VA does not recognize all those who served in the armed forces as “veterans.” Congress directed the VA to recognize as “veterans” only those servicemembers who were “discharged [] under conditions other than dishonorable.”<sup>20</sup> This phrase does not only exclude servicemembers with Dishonorable discharges.<sup>21</sup> Congress chose the term “discharged under conditions other than dishonorable” instead of the term “received a discharge characterization other than a Dishonorable” in order to separate the VA eligibility standard from the military discharge standard. The VA may grant veteran status to a servicemember with a fully “Dishonorable” discharge,<sup>22</sup> and it may deny veteran status to a servicemember with a fully “Honorable” discharge.<sup>23</sup> The Court of Appeals for the Federal Circuit has confirmed this interpretation<sup>24</sup> and the VA applies it.<sup>25</sup> It is the VA, not the DOD, who decides who is a veteran.

#### **VA standards to determine veteran status are inadequate**

However, Congress never gave the VA instructions on how to make this decision. Congress did not say what kinds, severity, or frequency of misconduct would lead a servicemember to forfeit his or her recognition as a “veteran.” Nor did Congress say the nature or duration of service that would overshadow later misconduct so that overall service would be honorable and thereby preserve the servicemember’s “veteran” status. Although examination of the legislative history provides some indication of what Congress meant by the phrase “under conditions other than dishonorable,”<sup>26</sup> the statute itself provides the VA with no instruction. Congress added some eligibility requirements, such as a prohibition on giving benefits to veterans discharged by General Court-martial,<sup>27</sup> however these are additional requirements that do not define what is “other than dishonorable” service is for the purpose of showing “veteran” status.<sup>28</sup>

In the absence of any instruction from Congress, the VA created its own definition.<sup>29</sup> The VA will presume that discharge was under honorable conditions if the military service provided an Honorable or a General discharge.<sup>30</sup> Otherwise, the VA will only grant “veteran” status after evaluating the service record and comparing it against its criteria for “discharge under dishonorable conditions.”<sup>31</sup> About 10,000 servicemembers each year receive discharges other than “Honorable” or “General”, such that the VA will not recognize them as “veterans” until the VA has decided that their conduct meets its standards for a discharge under honorable conditions.<sup>32</sup> In the Marine Corps, this includes about 10% of all servicemembers that complete Entry Level Status.<sup>33</sup>

The VA will decide that the misconduct resulted in dishonorable conditions of service if it involved any of the following “very broad”<sup>34</sup> categories:

*“(1) Acceptance of an undesirable discharge to escape trial by general court-martial. (2) Mutiny or spying. (3) An offense involving moral turpitude. This includes, generally, conviction of a felony. (4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious. (5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.”*

The VA will excuse this misconduct if the servicemember was “insane” at the time.<sup>35</sup> The VA has proposed to define “insanity” for this purpose in the same way that it is used to define the criminally insane: where there is “such a defect of reason ... that he or she did not know or understand the nature or consequence of the act, or that what he or she was doing was wrong.”<sup>36</sup>

These standards are notable for what they do not contain:

- First, there is no provision instructing the VA’s staff to consider whether misconduct was outweighed by a combat deployment. The regulations do state that “one minor offense” would be overlooked if service was otherwise “meritorious”, however the VA has said that a combat deployment is not inherently meritorious because this is merely performing “the job as required.”<sup>37</sup>
- Second, there is no provision instructing VA staff to consider whether behavior was mitigated by a difficult deployment. The VA has done so for other eligibility criteria, such as in regulations that instruct its staff that “hardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind.”<sup>38</sup> No similar regulation applies to deciding whether in-service misconduct bars recognition as a veteran.
- Third, no regulation considers whether a mental health condition may explain the misconduct, unless the person was fully “insane.”<sup>39</sup> The VA has proposed to adopt the same standard for “insanity” as what is used in criminal defense.<sup>40</sup> In

other words, the VA would not excuse even minor in-service misconduct unless the servicemember was so mentally ill that the VA would also excuse homicide.<sup>41</sup> This does not encompass the relatively moderate incapacity to conform to military discipline that might result from early symptoms of mental health trauma or traumatic brain injury.

### Denial of Care

These standards permit the VA to deny veteran status to the large majority of servicemembers it evaluates. Overall, the VA has decided that service was dishonorable in 80% of the cases it evaluates.<sup>42</sup> If all former servicemember asked the VA to determine their veteran status, the VA would decide that about 8,000 servicemembers each year should not be recognized as veterans.<sup>43</sup> While some of these servicemembers certainly forfeited their recognition as veterans, we believe that an 80% rejection rate reflects standards that are much too severe. Nor do we believe that the public expects 8,000 servicemembers every year to be denied recognition as veterans.

Servicemembers denied veteran status are eligible for almost no services from the VA. Congress limits almost all the VA's services to veterans or their survivors, spouses and dependents.

There is only one exception authorized by statute. Congress authorizes the VA to provide medical care for service-connected conditions to "certain people administratively discharged under other than honorable conditions."<sup>44</sup> In practice, this means that if a servicemember with an Other Than Honorable discharge applies for Compensation for a disability incurred in service, and if the VA decides that the person does not deserve veteran recognition, then the VA will deny Compensation for that condition but will allow the former servicemember to receive medical care for that condition only.

In practice, this does not happen very often. By the VA's own statistics, it provided health care for service-connected disabilities in only 7% of the cases where it had denied veteran status.<sup>45</sup> We routinely receive VA decisions on Compensation claims where the Regional Office denies veteran status but fails to determine whether the condition is service-connected for purposes of obtaining medical care for that condition.

#### **Terrance Harvey**

He deployed with the 82<sup>nd</sup> Airborne for the first Gulf War. He earned the CIB clearing bunkers and recovered casualties on the "Highway of Death." After his return he started experiencing symptoms of PTSD. He attempted suicide once during service. He felt that he was unable to receive care, and was denied permission to take leave to be cared for by his family. He left anyway, and when he voluntarily returned he was given an OTH discharge. He became estranged from his family, was living on the streets, and attempted suicide twice since separation. The VA still withholds care.

In many cases the VA simply refuses to even consider whether a servicemember should be recognized as a veteran. In our experience, a servicemember with a potentially disqualifying discharge who approaches a health center for care will be turned away. The VA will never even consider whether that person's conduct was honorable. The Seattle Times documented the case of an Army OEF veteran with a Bronze Star Medal and a PTSD diagnosis—a servicemember who should certainly be recognized as a veteran—who was turned away from a VA medical center without care.<sup>46</sup> This is contrary to official policy, according to which VHA eligibility staff are supposed to initiate a request for a Character of Discharge determination, the VBA's process for determining veteran status.<sup>47</sup> Instead, staff concluded “you are not a veteran” and “you are dishonorable” and refused to initiate a character of discharge review. In two cases handled by Swords to Plowshares, VHA staff agreed to initiate an eligibility review only after the involvement of an attorney.

### Delay of care

The VA's procedures delay its adjudication of this fundamental question, whether a servicemember deserves recognition as a veteran. Those delays result in extended denial of services even in cases where the servicemember is found to have served honorably.

The VA places Character of Discharge issues in its slowest adjudication lane. The task of

#### **Ted Wilson**

He volunteered for the Marines and deployed to Vietnam twice. He earned two purple hearts, was hospitalized for “nervous shock.” He attempted suicide while hospitalized after a second mental health crisis. On his second tour he had a breakdown and started a fight with MPs. He was given an OTH discharge. Without psychiatric care, he started illegal drug use, became homeless, and attempted suicide once. The VA still withholds care.

determining “veteran” status is considered an “Administrative Adjudication” by the VBA. These issues are handled by “non-rating” teams. In response to the claims backlog, the VBA has shifted staff onto “rating” teams, leaving “non-rating” teams understaffed. Currently, issues in the “non-rating” team are taking twice as long as “rating” issues.<sup>48</sup> Therefore VA compensation claims, as slow as they are, are handled twice as fast as the question of whether a servicemember is even a “veteran.” Because a Compensation claim from someone with a misconduct discharge must complete the Character of Discharge issue before the VBA even starts the service

connection issue, the total claim takes three times as long as a typical Compensation claim. At the Oakland Regional Office, these claims take on average two and a half years to complete. Eligibility staff at the Palo Alto Health System discourage veterans from asking the health center to request an adjudication because these requests usually take 3 years to complete.<sup>49</sup>

The VA does not provide medical care while it performs an evaluation of service. VA regulations allow for “tentative eligibility” to be provided while eligibility questions are answered,<sup>50</sup> however this regulation specifically excludes tentative eligibility where the issue is Character of Discharge.<sup>51</sup> The VHA has discretion to provide care on a “humanitarian basis” if the servicemember signs a contract agreeing to pay for the services if required;<sup>52</sup> however, the VHA does not routinely offer this while the VA is evaluating character of discharge.<sup>53</sup> For urgent services, such as emergency psychiatric care and emergency homeless services, this delay amounts to a denial of the service sought.

#### **IV. The VA’s practices increase the risk of veteran suicide**

Exclusion from VA care increases risk of suicide. The VA’s successful suicide prevention efforts lowered the rate of suicide among veterans enrolled in VA care.<sup>54</sup> However, the rate of suicide for veterans outside of VA care is increasing. In 2010, the latest data available, veterans outside of VA care were committing suicide 30% more frequently than those enrolled in VA care.<sup>55</sup> For the highest-risk cohort, male veterans under age 30, the suicide rate for those outside VA care is twice the rate of veterans under VHA care.<sup>56</sup> Excluding a servicemember from the VA increases the chance that this servicemember will commit suicide.

The VA knows these people by name. The VA has a list of servicemembers who committed suicide, based on state death reports. Some of them at some time asked the VA to evaluate their service and grant them VA care. The VA rejected them 85% of the time,<sup>57</sup> an even higher rate than the average 80% denial rate. That means the VA turned away at least 448 servicemembers who went on to commit suicide. The actual number is certainly higher, because the VA list does not receive death reports from all states, and it doesn’t include people who sought care at VA hospitals and where the staff turned them away without filing an eligibility request.

#### **V. Solutions**

Four changes can provide targeted solutions to the problems identified above.

**1. Issue: The VA denies veteran status without requiring consideration of mental health conditions and without consideration of deployment service.**

Solution: The VA should enact presumptions to give the benefit of the doubt to certain categories of servicemembers most at need of care: those who mental health disabilities acquired in service and those who were deployed to contingency operations.



**2. Issue: The VA does not provide care prior to deciding whether service was “under conditions other than dishonorable.”**

Solution: The VA should be instructed to provide health care to servicemembers pending original determination of veteran status.

**3. Issue: The VHA routinely fails to initiate an evaluation of character of service.**

Solution: The VHA should automatically start a request for a “Character of Discharge” determination when a servicemember with an OTH or BCD discharge requests health care, as the VBA does for Compensation and Pension claims.

**4. Issue: The VBA places those decision in its slowest decision-making lane.**

Solution: The VA should assign Character of Discharge reviews into expedited decision teams.

See Exhibit 1 below for legislative language that would address these issues.

## **VI. Conclusion**

Our current wars created tens of thousands of people injured by the conditions of their service. Often, this results in behavioral disorders that may appear as misconduct to their chains of command. There is a pipeline from in-service mental health trauma to behavioral dysfunction to misconduct discharge, and it ends with veterans at risk of suicide denied access to VA support. The VA’s administrative processes deny immediate care to these servicemembers, and creates bureaucratic barriers to critical care that can save lives. Certain behaviors may be incompatible with continued military service, but we also recognize that those servicemembers, who once served honorably, deserve and need our support after they separate. Congress gave the VA the duty to extend services to those servicemembers. Their slow bureaucratic process and their refusal to follow their own rules effectively deny care and dignity to those servicemembers. They deserve better.

Exhibit 1: Suggested Legislative text

**SEC. \_\_. ELIGIBILITY FOR SERVICEMEMBERS WITH SERVICE IN A CONTINGENCY OPERATION OR WITH MENTAL HEALTH DISABILITIES.**

(A) EVALUATION OF CONDITIONS OF DISCHARGE.— Section 5303B is Title 38 of the United States Code is added to read:

“5303B EVALUATION OF CONDITIONS OF DISCHARGE.—

(a) Any former servicemember who served on active duty in a theater of combat operations or an area at a time during which hostilities occurred in that area shall be presumed to have been discharged under conditions other than dishonorable in the absence of clear and convincing evidence to the contrary.

(b) Servicemembers who acquired mental health disabilities during service shall be presumed to have served under conditions other than dishonorable in the absence of clear and convincing evidence to the contrary.

(c) The Secretary may prescribe by regulation additional criteria for evaluating conditions of discharge.”

(1) The presumptions in this paragraph do not overcome the prohibitions in Section 5303 of Title 38.

(b) TENTATIVE ELIGIBILITY DETERMINATIONS.—Section 1701 of Title 38 of the United States Code is amended to add the following after paragraph (a)(5):

“(6) The Secretary shall provide tentative eligibility to benefits under Chapter 17 and under Chapter 20 to former service persons not described in paragraphs (1) and (2) who received other than honorable discharges, pending verification of discharge or release under conditions other than dishonorable. No overpayments will be assessed for services provided during this period.”

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<sup>1</sup> "Suicide Rates in VHA Patients through 2011 with Comparisons with Other Americans and other Veterans through 2010", Veteran's Health Administration, January 2014.

<sup>2</sup> Id.

<sup>3</sup> VHA, "Suicide Rates in VHA Patients through 2011 with Comparisons with Other Americans and other Veterans through 2010." (In 2000 the suicide rate for male veterans under 30 outside of VHA care was 63 per 100,000, almost twice the rate of those who are receiving VA healthcare.)

<sup>4</sup> Jakupcak et al. (2009). "PTSD as a Risk Factor for Suicidal Ideation in Iraq and Afghanistan War Veterans." *Journal of Traumatic Stress*, 22, 303-306. doi: 10.1002/jts.20423

<sup>5</sup> Jakupcak et al. (2011). "Hopelessness and Suicidal Ideation in Iraq and Afghanistan War Veterans Reporting Subthreshold and Threshold PTSD", *Journal of Nervous and Mental Disease*, 199, 272-275.

<sup>6</sup> Brenner et al. (2011). "Suicide and traumatic brain injury among individuals seeking Veterans Health Administration services." *The Journal of head trauma rehabilitation* 26.4: 257-264.

<sup>7</sup> Nock, et al. (2014). "Prevalence and Correlates of Suicidal Behavior Among Soldiers: Results From the Army Study to Assess Risk and Resilience in Servicemembers (Army STARRS)." *JAMA Psychiatry*;71(5):514-522.

<sup>8</sup> Kline et al. (2011). "Suicidal ideation among National Guard troops deployed to Iraq: the association with postdeployment readjustment problems." *The Journal of nervous and mental disease*. 199(12):914-20.

<sup>9</sup> Nock, et al. (2014). "Prevalence and Correlates of Suicidal Behavior Among Soldiers: Results From the Army Study to Assess Risk and Resilience in Servicemembers (Army STARRS)." *JAMA Psychiatry*; 71(5): 514-522.

<sup>10</sup> Sareen et al. (2005). "Anxiety disorders associated with suicidal ideation and suicide attempts in the National Comorbidity Survey." *Journal of Nervous and Mental Disease*. 193, 450-454.

<sup>11</sup> James et al. (2014), "Risk-Taking Behaviors and Impulsivity Among Veterans With and Without PTSD and Mild TBI", *Military Medicine*, 179, 4:357; Elbogen et al. (2014). Violent behavior and post-traumatic stress disorder in US Iraq and Afghanistan Veterans. *The British Journal of Psychiatry*, Advance online publication. doi:

10.1192/bjp.bp.113.134627; Tateno et al., "Clinical Correlates of Aggressive Behavior After Traumatic Brain Injury", *The Journal of Neuropsychiatry and Clinical Neurosciences* 2003;15:155-160. doi:10.1176/appi.neuropsych.15.2.155.

<sup>12</sup> See "General Ratings Formula for Mental Disorders" 38 CFR 4.150 (2009).

<sup>13</sup> U.S. Army "Health Promotion, Risk Reduction and Suicide Prevention Report." July 28, 2010, page 43

<sup>14</sup> *Austin Statesman*, "'Bad paper' discharges can stymie veterans' health care: Diagnosed with post-traumatic stress disorder before he was kicked out of Marines for failing a drug test without counseling" (October 3, 2010) available at <http://www.statesman.com/news/news/state-regional-govt-politics/bad-paper-discharges-can-stymie-veterans-health--1/nRyPr/>; *Colorado Springs Gazette* "Other than Honorable" (2013) available at <http://cdn.csgazette.biz/soldiers/>; *Seattle Times*, "Troubled veterans left without health-care benefits" (August 11, 2013) available at [http://seattletimes.com/html/localnews/2018894574\\_vets12m.html](http://seattletimes.com/html/localnews/2018894574_vets12m.html); *National Public Radio*, "Veterans and Other Than Honorable Discharges" (2013) available at <http://www.npr.org/series/250013036/veterans-and-other-than-honorable-discharges>.

<sup>15</sup> For example, AR 600-235 Ch. 10.

<sup>16</sup> U.S. Army "Health Promotion, Risk Reduction and Suicide Prevention Report." July 28, 2010, passim. and page 70 ("Recommended actions: Enforce separation actions for high risk behavior.")

<sup>17</sup> Quoted in "Other Than Honorable", *Colorado Springs Gazette* <http://cdn.csgazette.biz/soldiers/day2.html>.

<sup>18</sup> Highfill-McRoy et al. "Psychiatric diagnoses and punishment for misconduct: the effects of PTSD in combat-deployed Marines", *BMC Psychiatry* 2010, 10:88.

<sup>19</sup> Milliken CS, Auchterlonie JL, Hoge CW. Longitudinal Assessment of Mental Health Problems Among Active and Reserve Component Soldiers Returning From the Iraq War. *JAMA*. 2007;298(18):2141-2148.

doi:10.1001/jama.298.18.2141.

<sup>20</sup> 38 USC 101(2)

<sup>21</sup> 38 USC 101(2)

<sup>22</sup> This arises when the VA finds that a servicemember with a Dishonorable discharge was "insane" at the time of the misconduct that resulted in the discharge. 38 U.S.C. 5303(b), 38 C.F.R. 3.12(b).

<sup>23</sup> This arises where the servicemember received a misconduct discharge that the military service later upgraded to Honorable based on certain discharge review programs initiated in the 1970s, but where the VA nevertheless found that the conduct was dishonorable by its own standards. 38 U.S.C. 5303(e), 38 C.F.R. 3.12 (h).

<sup>24</sup> In *Camarena v. Brown*, 60 F. 3d 843 (Fed.Cir. 1995), a servicemember appealed a decision by the VA that his service ending in a Bad Conduct discharge was “under dishonorable conditions.” The servicemember argued that the phrase “under dishonorable conditions” only excluded servicemembers with Dishonorable Discharges. The Court held that the VA’s determination of whether a discharge was “other than under dishonorable conditions” is not bound by a military service’s decision that the discharge characterization was dishonorable.

<sup>25</sup> 38 C.F.R. § 3.12(a).

<sup>26</sup> See *Beyond T.B.D.: Understanding VA’s Evaluation of a Former Servicemember’s benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 Mil.L.Rev 1 (2012); *Recovering an Institutional Memory: The Origins of the Modern Veterans’ Benefits System from 1914 to 1958*, 5 Vet. L. Rev. 1 (2013).

<sup>27</sup> 38 U.S.C. 5303(a).

<sup>28</sup> The prohibitions listed in 38 U.S.C. 5303(a) are not provided as standards for the phrase “conditions other than dishonorable” that defines a “veteran” in 38 U.S.C. 101(2). They are additional requirements that apply even if the VA decides that the discharge was “under conditions other than dishonorable” and that the servicemember is therefore a “veteran.” In that case the person would be a “veteran” who is barred from all V.A. benefits. If the VA finds that a person was discharged under dishonorable conditions then they are simply not a “veteran” in the first place.

<sup>29</sup> 38 C.F.R. 3.12(a, b, d).

<sup>30</sup> 38 C.F.R. 3.12(a). That presumption may be overcome if the discharge characterization was provided as a result of one of several discharge review programs that occurred in the 1970s. 38 U.S.C. 5303(e), 38 C.F.R. 3.12 (h).

<sup>31</sup> 38 C.F.R. 3.12(d).

<sup>32</sup> “Active Duty Military Discharges, 2004-2011”, Department of Defense Active Duty Transaction Files, available at [http://www.dod.mil/pubs/foi/Personnel\\_and\\_Personnel\\_Readiness/Personnel/12-F-0647\\_Active\\_Duty\\_Military\\_Discharges\\_2004-2011.xlsx](http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/12-F-0647_Active_Duty_Military_Discharges_2004-2011.xlsx)

<sup>33</sup> Id.

<sup>34</sup> *Manuel v Shinseki*, Ct. App. Vet. Cl., No. 10-1858 (Vet. App. 2012) (characterizing the governing regulations as “very broad”).

<sup>35</sup> 38 U.S.C. 5303(b), 38 C.F.R. 3.12(b).

<sup>36</sup> Proposed 38 C.F.R. 5.1, 71 FR 16,464, 16,468 (2006).

<sup>37</sup> *Title Redacted by Agency*, 03-09 368, Bd. Vet. App. (June 19, 2009).

<sup>38</sup> 38 C.F.R. 3.12(c)(6)(ii).

<sup>39</sup> 38 C.F.R. 3.12(b).

<sup>40</sup> Proposed 38 C.F.R. 5.1, 71 FR 16,464, 16,468 (2006) (explaining that the standard is the same as the one used to define criminally insanity under the common law).

<sup>41</sup> Id. (explaining that the new regulation will adopt for all purposes the definition of insanity previously used to evaluate responsibility for homicide).

<sup>42</sup> The Veterans' Disability Benefits Commission, *Honoring the Call to Duty: Veterans’ Disability Benefits in the 21st Century* (2007), page 97.

<sup>43</sup> See text accompanying note 32.

<sup>44</sup> 38 C.F.R. 3.360.

<sup>45</sup> Data provided by VHA Central Office Analyst in a phone interview on Just 27, 2014.

<sup>46</sup> *Seattle Times*, “Troubled veterans left without health-care benefits” (August 11, 2013) available at [http://seattletimes.com/html/localnews/2018894574\\_vets12m.html](http://seattletimes.com/html/localnews/2018894574_vets12m.html).

<sup>47</sup> See “Note” in “Eligibility Determination”, VHA Handbook 1601A.02, page 5 (Nov. 5, 2009).

<sup>48</sup> See “Non-rating activity days pending” in *ASPIRE Benefits Dashboard* at <http://www.dod.mil/pubs/foi/recent.html>.

<sup>49</sup> Phone conversation with Palo Alto Health Care System eligibility staff, October 27, 2014.

<sup>50</sup> 38 CFR 17.34 (establishing a narrow provision for “tentative eligibility determinations” that do not apply where the character of discharge is in question).

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<sup>51</sup> 78 FR 28140, 28141 (explaining that only Honorable and General discharges qualify for the tentative eligibility rule because those are the only cases where eligibility “probably will be established”).

<sup>52</sup> 38 CFR 17.102(a)

<sup>53</sup> The VHA eligibility determination manual does not include an instruction to make this available. See “Eligibility Determination”, VHA Handbook 1601A.02, page 4-5 (Nov. 5, 2009).

<sup>54</sup> “Suicide Rates in VHA Patients through 2011 with Comparisons with Other Americans and other Veterans through 2010”, Veteran’s Health Administration, January 2014.

<sup>55</sup> “Suicide Rates in VHA Patients through 2011 with Comparisons with Other Americans and other Veterans through 2010”, Veteran’s Health Administration, January 2014.

<sup>56</sup> VHA, “Suicide Rates in VHA Patients through 2011 with Comparisons with Other Americans and other Veterans through 2010.” (In 2000 the suicide rate for male veterans under 30 outside of VHA care was 63 per 100,000, almost twice the rate of those who are receiving VA healthcare.)

<sup>57</sup> Data provided by VHA Central Office Analyst in a telephone interview in June 2014.